Office - Supreme Court, U. S.
MAY 28 1952
CLERK

Supreme Court of the United States

October Term, 1951

No. 708

JAMES B. ARMSTRONG,

Petitioner,

against

WAR CONTRACTS PRICE ADJUSTMENT BOARD,

Respondent.

REPLY BRIEF OF PETITIONER

FREDERICK H. KOSCHWITZ,
WILLIAM F. KELLY,
P. J. J. NICOLAIDES,
RICHARD L. NICOLAIDES,
Counsel for Petitioner.

207 BAR PRESS INC., 54 LAFAYETTE ST., NEW YORK 13 — WA. 5-8498-9.

INDEX

	PAGE
Statement	1
Reply to Respondent's Argument	2
Conclusion	8

Table of Cases Cited

Brady v. War Contracts Price Adjustment Board, 11 T. C. 280	7
A. P. Dowell, Jr. v. Forrestal, 13 T. C. 845	7
Fine v. War Contracts Price Adjustment Board, 9 T. C., 600	3, 7
Bert French v. War Contracts Price Adjustment Board 13 T. C., 276, appeal dismissed, 182 F. 2d, 560	8
Greaves v. War Contracts Price Adjustment Board, 10 T. C., 886	7
Iverson & Laux, Inc. v. Forrestal, 6 T. C., 247	8
Edward A. Martin Associates v. War Contracts Price Adjustment Board, 4 CCF 50970	6, 7
Nagel v. War Contracts Price Adjustment Board, 4 CCF 50549	7

PAGE

Rosner v. War Contracts Price Adjustment Board, 17 T. C. 445 6

Wolff v. Macauley, 8 T. C. 146 ..... 3, 7

Statute Involved

Renegotiation Act of 1943:

Sec. 403 (a)(5)(A) 3, 7

Sec. 403 (a)(5)(B) 2, 3, 4, 8

Sec. 403 (c)(1) 2

Sec. 403 (c)(5)(A) 2

Other Authorities

Report of Hearings pursuant to H. R. 30, Vol. 1, 78th Cong., 1st Sess. 6

Report of House Committee on Naval Affairs, No. 353, 78th Cong. 1st Sess. 5

H. R. 7304, 77th Cong., 2nd Session 4

House Report No. 2356 4

Supreme Court of the United States

October Term, 1951

No. 708

JAMES B. ARMSTRONG,

Petitioner,

against

WAR CONTRACTS PRICE ADJUSTMENT BOARD,

Respondent.

REPLY BRIEF OF PETITIONER

Statement

In the petition for Writ of Certiorari herein the War Contracts Price Adjustment Board was named as the Respondent. An application by petitioner is now pending before this Court for an order substituting the United States of America as respondent in place of said War Contracts Price Adjustment Board.

Replying to Respondent's Argument

The statement of respondent, at page 4 of his brief, that the sole basis for this petition is that ordinary commission salesmen are not within the reach of the Renegotiation Act, is misleading. It is calculated to create the impression that salesmen's commissions are untouchable under the Act. Such is not the case. It is petitioner's contention that, although there is no statutory authority to renegotiate him individually as a subcontractor, his commissions were, nevertheless, properly reviewable in the renegotiation proceedings against his principals as part of their selling expenses (Pet Brief, pp. 22-25).

Respondent's brief also shows some confusion of thought regarding the subject matter of the instant renegotiation proceedings. They could not be instituted for the purpose of renegotiating petitioner's "compensation" or "earnings," as implied at page 4 of respondent's brief. The Renegotiation Act provides that renegotiation proceedings shall be commenced against *contractors* and *subcontractors* subject to the Act (Subsection 403 (c)(1)) who are required to file reports on the contracts or subcontracts which they hold (Subsection 403 (c)(5)(A)).

It is not denied by respondent that both the proceedings here involved were commenced against the petitioner as a subcontractor under subsection (a)(5)(B) (See R. 12, 110). Nor has it been disputed that petitioner's commissions on his sales were duly and properly reported in the renegotiation proceedings had against his principals and were not objected to in any way. (Petitioner's Brief, p. 6). It is submitted therefore, that, properly speaking, the questions for consideration in this case are: (1) whether the petitioner comes within the category of persons that (a)(5)(B)

was intended to encompass as subcontractors and (2) Did he have any contingent fee contracts with his principals within the meaning of said subsection?

Respondent argues in effect that since petitioner's commissions were conditioned upon his securing for his principals purchase orders which are defined as subcontracts under (a)(5)(A) of the Act, he received contingent fees within the meaning of the Statute. In upholding respondent's contention, petitioner submits that the lower court has followed a mode of construction which the Tax Court had disclaimed in two previous decisions: *Wolff* v. *Macauley*, 8 T. C. 146 and *Fine* v. *War Contracts Price Adjustment Board*, 9 T. C. 600—neither of which was cited in the opinion of the Tax Court in this case.

In *Wolff* v. *Macauley, supra,* the respondent contended that since architects' fees, under subcontracts, were computed at 5% of the construction costs, and their fees on a purchase order, figured at the same percentage of estimated costs, were "determined with reference to the amount of" such subcontracts and purchase order and were, therefore, renegotiable under subsection (a)(5)(B).

In rejecting respondent's contention, the Tax Court declared at page 152, (italics added):

> "* * * *the phrase* 'determined with reference to the amount of such a contract', etc. may not be isolated as the respondent, would have it, but *must be construed in connection with the preceding language and in the light of the purpose sought to be accomplished by Congress.* * * *"

For the same reason, the Tax Court in *Fine* v. *War Contracts Price Adjustment Board,* 9 T. C. 600, rejected a similar contention that the petitioner in that case was a subcontractor under (a)(5)(B) merely because his com-

pensation was based or computed upon the amount of contracts or subcontracts procured for his principals. The court again called attention to the fact that the phrase "determined with reference", etc. may not be isolated from the text of the subsection but relates back to the preceding language.

Construing the phrase "determined with reference", etc. in relation to the preceding language in (a)(5)(B), and "in the light of the purpose sought to be accomplished by Congress" it is petitioner's contention that said subsection has been wrongly interpreted by respondent and wrongly applied to cover a bona fide commission salesman like petitioner who had no contingent fee contract or arrangement to solicit or procure government contracts for his principals, within the meaning and intent of the Renegotiation Act.

As a further indication that (a)(5)(B) was not intended to apply to ordinary commission salesmen, attention is called to the fact that the original approach by Congress to the remedy of the contingent fee problem contemplated the outlawing altogether of all contingent fees (Appendix B, Petitioner's supporting brief, p. 29; also H. R. 7304, 77th Congress, 2nd Session, and House Report No. 2356 accompanying the same). It is inconceivable that Congress would attempt to outlaw the earnings of bona fide commission salesmen.

The assertion on page 5 of respondent's brief to the effect that Congress, in enacting (a)(5)(B), did not intend to distinguish between war brokers and legitimate commission salesmen, could only be made by completely disregarding the very considerable evidence of Congressional intent which is set forth at pages 29 to 38 of petitioner's brief. This evidence makes abundantly clear that said subsection was enacted for the specific and sole purpose

of subjecting to renegotiation only the so-called war brokers by classifying them as subcontractors. Otherwise, the numerous statements of Mr. Vinson, Senator Walsh and those requesting the incorporation of said provision into the Act, would have no significance whatever.

This evidence, much of which is set forth in Appendix B of petitioner's brief, makes crystal clear, despite respondent's assertion to the contrary, that, in discussing the purpose of the measure, the evils which Congress intended to remedy by its enactment were linked only with the activities of the war brokers, their contingent fee contracts or arrangements and the exorbitant fees which they were realizing under them.

In an attempt to substantiate his contention, respondent, at page 6 of his brief, quotes briefly from the Report of the House Committee. However, if important omissions are supplied and the quoted language is placed in proper perspective, those brief extracts are of no help to respondent.

As set forth on pages 34 and 35 of petitioner's brief, the House Report, after pointing out the specific purpose of the measure, recited that at the hearings before the Committee considerable evidence was presented which demonstrated the unconscionable profits being realized by numerous manufacturers agents or "war brokers" in connection with the procurement of Government contracts.

The Report then went on to state (italics added):

> "Several of *these* agents appeared before the Committee and testified at length. *Their fees* and commissions, based on a percentage of business obtained, were so excessive as to become scandalous and shocking * * *."

The report of the Committee hearings discloses that about ten of those "agents" appeared before the Com-

mittee and testified. They were all Washington agents who did practically no commercial selling. It is to be noted that in the report of the hearings and in the debate in Congress, as well as in the testimony of Departmental representatives who testified before the Committee, those Washington Agents are repeatedly referred to as "these agents" or "these brokers" (House Committee on Naval Affairs, Hearings on H. R. 1900 March 25, 1943; also Appendix B to petitioner's brief, pages 29-37).

It is clear, therefore, that the extracts quoted by respondent have application only to war brokers or Washington Five Percenters who, as the report went on to state, "only opened their offices and began business in Washington at the beginning of the emergency period."

The fears raised by respondent, at page 6 of his brief, respecting the difficulty of distinguishing between bona fide commercial salesmen and war brokers are groundless. Most questions of coverage will require the consideration of factual situations, whether the party involved is an individual, a partnership or a corporation. The line of cleavage between the duties of a legitimate commercial salesman, like petitioner, and the activities of the war brokers or influence peddlers is made unmistakably clear by two of the cases cited by respondent on page 7 of his brief, namely *Rosner* v. *War Contracts Price Adjustment Board* 17 T. C. 445 and *Edward A. Martin Associates, Inc.* v. *War Contracts Price Adjustment Board,* 4 CCF 50970.

Each of those cases furnishes an excellent example of the type of contingent fee contract which section (a)(5)(B) was intended to encompass. In the *Rosner* case the petitioner was the "accredited agent" in Washington for a manufacturing concern from 1941 through 1945. His commissions (amounting to approximately $119,000 in

1942) were based on orders received from the United States Maritime Commission and for his work "in connection with the United States Maritime Commission matters and all other departmental work".

Edward A. Martin Associates, Inc. involved a Washington agent who incorporated and claimed unsuccessfully that he was a subcontractor within the meaning of (a)(5)(A). The decision in each of these two cases sets forth the characteristic type of contract or arrangement used by war brokers.

The other cases cited by respondent in his brief are of no assistance to him.

Wolff v. *Macauley*, 8 T. C. 146 and *Fine* v. *War Contracts Price Adjustment Board*, 9 T. C. 600 have already been referred to.

In *Brady* v. *War Contracts Price Adjustment Board*, 11 T. C. 280, the question was whether the renegotiation proceeding had been timely commenced. It appears that the activities of the petitioner were disputed. Brady, a resident of Washington who received a very substantial annual "retainer fee" from a manufacturing concern, claimed to be an engineer and consultant in the field of electronics and a patent attorney in the same field while the Government contended that his chief occupation was the sale for his principal of radar equipment to the Government.

Examination of the records in *Nagel* v. *War Contracts Price Adjustment Board*, 4 CCF 50549, *A. P. Dowell, Jr.* v. *Forrestal*, 13 T. C. 845 and *Greaves* v. *War Contracts Price Adjustment Board*, 10 T. C. 886, discloses that

apparently the petitioner in each of those cases assumed that the respondent had the authority to renegotiate him. There is no indication that inquiry had been made in any of them respecting the legislative history of (a)(5)(B). It is just as reasonable to suppose that each petitioner had failed to familiarize himself with the legislative history of said subsection as to assume that he had done so and chose not to make the contention now advanced by the petitioner in the instant proceeding.

Bert French, 13 T. C. 276 and *Iverson & Laux, Inc.* v. *Forrestal,* 6 T. C. 247, involved direct sales to the United States Navy Supply Department and to the Defense Plant Corporation, respectively, and in each case the Court held that the Act was clearly applicable.

Therefore, the above decisions furnish no support for the respondent's contention in this case.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

FREDERICK H. KOSCHWITZ,
WILLIAM F. KELLY,
P. J. J. NICOLAIDES,
RICHARD L. NICOLAIDES,
Counsel for Petitioner.